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No. 75-1530

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARVIN HORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that this Court should re-examine the validity of the *Allen* charge.[1]

A six-count indictment filed in the United States District Court for the Southern District of West Virginia charged petitioner and others with conspiracy to destroy a school receiving federal financial assistance, unlawfully manufacturing destructive devices, and destruction of a school, in violation of 18 U.S.C. 371 and 844(f) and 26 U.S.C. 5861(f). Petitioner, named in the conspiracy count and three substantive counts, was convicted of conspiracy and acquitted of the substantive charges. He was sentenced to imprisonment for three years. The court of appeals affirmed *per curiam* (Pet. App. 14a-15a).

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[1] *Allen* v. *United States*, 164 U.S. 492.

Petitioner and his co-defendants were participants in a movement protesting the presence of certain textbooks in the elementary schools of Kanawha County, West Virginia. Petitioner, a self-proclaimed minister, and co-defendant Larry Stevens were leaders of the Campbells Creek Anti-Textbook Headquarters (Tr. 105-107).[2] In October and November 1974, individuals affiliated with the Anti-Textbook Headquarters attempted to destroy several area schools. On October 9, 1974, co-defendant Delbert Lee Rose, on instructions from Stevens, caused extensive damage at the Midway Elementary School by breaking a window, pouring gasoline inside the school, and igniting the gasoline (Tr. 115-116). Thereafter, anti-textbook members, including petitioner, discussed means of preventing the operation of the school by destroying it. One proposal given serious consideration involved placing a sealed five-gallon can of gasoline on the school's furnace boiler, which, when heated, would cause the can to explode (Tr. 117, 119). After petitioner offered to furnish the can, he and Rose proceeded to petitioner's house to pick it up. Pursuant to a prearranged plan designed to conceal from petitioner's wife the actual reason for donating the can, petitioner arrived at his house first. Rose then knocked on the door and, when petitioner and his wife answered, he asked to borrow a can of gasoline on the pretense that his car had run out of gasoline. Petitioner obtained a gasoline can from his back yard and gave it to Rose (Tr. 120-121).

The gasoline can plan was not carried out because Stevens' and Rose gained access to dynamite. At the Anti-Textbook Headquarters, co-defendant Michael

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[2]We are lodging with the Clerk of this Court the five-volume transcript of the trial and sentencing proceedings.

Blankenship and Stevens' wife asked petitioner for twenty dollars, which they intended to use to pay for dynamite. When asked by petitioner why the money was needed, Blankenship told petitioner that it was for "something he wouldn't want to get caught with * * *" (Tr. 302). Petitioner motioned to Blankenship to be silent, handed the money to Mrs. Stevens, and left the room (Tr. 302).

During the late evening hours of October 21, 1974, members of the anti-textbook campaign met at the Campbells Creek headquarters to discuss their protest activities. Petitioner told the others that, according to law, the Midway School was not allowed to operate if it could not provide a hot lunch program. Petitioner stated that if the school cafeteria were destroyed the school would therefore be required to shut down (Tr. 122). After reciting Biblical passages which he regarded as supporting their destructive activities, petitioner commented that he had paid enough taxes in the past decade to own the school and that the members of the protest movement had his permission to do anything they wanted to it (Tr. 123, 218). That same evening Stevens and Melvin Dickerson made a dynamite bomb and Rose hurled it into a classroom of the Midway Elementary School, causing extensive damage to the area in which the explosion occurred (Tr. 124, 129-131, 163-164).

The jury began its deliberations at 9:30 a.m. and continued until noon. It resumed at 1:30 p.m. (Tr. 897, 899, 900). Within the hour the court, over defense objection, determined that it would give a supplemental condensed *Allen* charge in language previously approved by the Fourth Circuit (Tr. 901). The instruction, delivered at about 2:30 p.m., in essence directed the jurors not to surrender an honest conviction, but urged them to reconsider their views in light of opinions held by other

jurors (Tr. 903-905). After receiving the supplemental charge, the jury deliberated for an additional hour and nine minutes before returning its verdict (Tr. 905, 906).

Petitioner contends that this Court should resolve an asserted conflict among the circuits regarding the continued validity of the traditional *Allen* charge. It is true that four courts of appeals, in the exercise of their supervisory powers, have held that the *Allen* charge should be modified.[3] However, none has held that the *Allen* charge in its traditional language, see *Allen* v. *United States*, 164 U.S. 492, violates any constitutionally protected right. Moreover, all of the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict. In these circumstances, the differences among the courts of appeals, reflecting an ongoing re-examination of the precise wording of a proper supplemental instruction, do not presently require the attention of this Court.[4]

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[3]The Fourth Circuit continues to approve the *Allen* charge with minimal modification. *United States* v. *Sawyers*, 423 F. 2d 1335 (C.A. 4). Four other circuits have ordered district courts in their jurisdiction to refrain from using the traditional *Allen* charge. *United States* v. *Angiulo*, 485 F. 2d 37 (C.A. 1); *United States* v. *Thomas*, 449 F. 2d 1177 (C.A.D.C.); *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017.

[4]This Court has recently denied certiorari in several other cases presenting a similar issue. See, *e.g.*, *Perez-Vega* v. *United States*, No. 75-5937, certiorari denied, March 22, 1976; *De La Fuente* v. *United States*, No. 75-5310, certiorari denied, November 17, 1975; *Lee* v. *United States*, No. 74-6345, certiorari denied, 422 U.S. 1044.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.